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No. 93-390

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In the Supreme Court of the United States

OCTOBER TERM, 1993

THE YOUGHIOGHENY AND OHIO COAL COMPANY,
PETITIONER

v.

WAYNE N. MCANGUES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Black Lung Benefits Act and interim regulations applicable to claims filed before April 1, 1980, an employer may rebut the presumption of total disability due to coal-related pneumoconiosis by showing that the miner also has an unrelated, non-pulmonary disability.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-11a) is reported at 996 F.2d 130. The decisions of the Benefits Review Board (Pet. App. 13a-18a, 24a-33a, 40a-44a) are unreported. The last decision of the administrative law judge (Pet. App. 19a-23a) is reported at 14 Black Lung Rep. (MB) 3-717; the ALJ's other decisions (Pet. App. 34a-39a, 45a-50a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1993. The petition for a writ of certiorari was

filed on September 9, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*, provides benefits to former coal miners or their survivors for total disability or death due to pneumoconiosis arising out of coal mine employment. See 30 U.S.C. 901(a). In the case of a coal miner who suffers or suffered from pneumoconiosis and who was employed in mine work for at least ten years, the Act establishes a rebuttable presumption that the disease arose out of coal mine employment. 30 U.S.C. 921(c)(1).[1] The interim regulations (20 C.F.R. Pt. 727) promulgated by the Sec-

[1] Section 921(c) applies by its terms only to claims filed before December 31, 1973, and adjudicated under "interim" regulations promulgated by the former Department of Health, Education, and Welfare (HEW) after Congress amended the BLBA in 1972 to liberalize its application. See *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2528-2529 (1991). Those regulations established a rebuttable presumption of total disability due to pneumoconiosis based on certain x-ray or ventilatory evidence. See 20 C.F.R. 410.490. In 1977 Congress amended the BLBA and directed the Secretary of Labor, in adjudicating claims filed after December 31, 1973, to apply criteria "not * * * more restrictive" than those applicable under the HEW regulations, until such time as the Secretary promulgated permanent regulations under the Act. 30 U.S.C. 902(f)(2). The permanent regulations (codified at 20 C.F.R. Pt. 718) took effect on April 1, 1980, see 20 C.F.R. 718.1(b), and are not at issue in this case. The Secretary of Labor's interim regulations, codified at 20 C.F.R. Pt. 727, thus apply to claims (like that in this case) filed after December 31, 1973, but before April 1, 1980, and embody presumptions generally parallel to (and in any event not more restrictive than) the presumptions embodied in Section 921(c) and the HEW interim regulations. See generally *Pauley*, 111 S. Ct. at 2527-2530; *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 139, 141-142, 152-154, 158 n.31 (1987).

retary of Labor, which are applicable to this case and others filed before April 1, 1980, also allow a claimant employed in mine work for at least ten years (or his survivor) to establish a rebuttable presumption (known as the "interim presumption") of total disability due to pneumoconiosis arising out of his mining employment. That presumption may be established in one of several ways, including through x-ray evidence, ventilatory capacity tests, blood gas studies, or other medical evidence (typically a doctor's opinion). 20 C.F.R. 727.203(a)(1)-(4). The employer may then rebut the interim presumption by establishing any of four contrary facts: (i) that the claimant is performing his usual or comparable work, (ii) that the claimant is able to do such work, (iii) that the claimant's total disability or death "did not arise in whole or in part out of coal mine employment," or (iv) that the claimant does not or did not in fact have pneumoconiosis. 20 C.F.R. 727.203(b)(1)-(4). This case involves the third form of rebuttal.

2. Claimant McAngues began working for petitioner as an underground coal miner in 1965. He left coal mining in 1976 after sustaining serious head injuries in an automobile accident. Pet. App. 2a. In April 1978 McAngues applied for disability benefits under the BLBA, claiming total disability due to pneumoconiosis. *Ibid.* An administrative law judge (ALJ) awarded benefits, finding that McAngues had established his entitlement to the interim presumption of total mining-related disability under Section 727.203(a) on the basis of qualifying x-ray and ventilatory evidence. Pet. App. 46a-47a. The Benefits Review Board vacated that decision and remanded for reconsideration of petitioner's rebuttal evidence. *Id.* at 40a-44a. The ALJ again awarded benefits on remand, *id.* at 39a, and the Board again remanded for

further explanation and reconsideration of the rebuttal evidence. *Id.* at 28a-31a; see *id.* at 2a, 14a-15a.

On the second remand the ALJ once again awarded benefits, Pet. App. 22a, holding that the claimant had "a totally disabling pulmonary impairment caused by his pneumoconiosis" and that petitioner had failed to prove, as required by Section 727.203(b)(3), that "pneumoconiosis played no part in causing the miner's disability." Pet. App. 21a. The ALJ again gave greater weight to the opinion of McAngues's medical expert (Dr. Tipton) than to that of petitioner's expert (Dr. Kress), on the ground that Tipton reached his conclusion that McAngues was disabled by pneumoconiosis "immediately after his examination of the Claimant in January of 1982," whereas Kress had not examined or tested McAngues since 1979 and had based his rejection of the 1982 test results on a general skepticism that the claimant's condition could have deteriorated significantly since the time of his examination.[2] *Id.* at

[2] When Kress examined McAngues in 1979, ventilatory tests produced values above the limits established for invocation of the interim presumption. Pet. App. 47a, 51a; see 20 C.F.R. 727.203(a)(2). In 1982, Tipton recorded McAngues's medical and work history as well as the results of a physical examination, a chest x-ray, and newly conducted ventilatory and blood gas tests. Pet. App. 56a-60a. The x-ray was positive for pneumoconiosis, and the studies "produced values well within the levels required for invocation of the presumption of total disability." *Id.* at 47a; see *id.* at 59a. Reviewing Tipton's report, Kress found it "quite apparent that the results obtained are strikingly reduced from those [he had] found some twenty-six months earlier." *Id.* at 52a. He doubted, however, that the decreased pulmonary function could have resulted from "the natural progression of chronic obstructive pulmonary disease," *ibid.*, and hypothesized that McAngues "must have had a respiratory infection at the time of Dr. Tipton's examination." *Ibid.* Tipton, however, did not note the presence of

20a-21a; see also *id.* at 38a, 48a. At the Board's direction, the ALJ also examined the medical records concerning McAngues's car accident; he found that they had no probative value, since they did not address claimant's pulmonary condition. *Id.* at 22a.

The Benefits Review Board affirmed. Pet. App. 13a-18a. It held that the ALJ had acted within his discretion in weighing the medical evidence and crediting Tipton's assessment, because Kress had based his conclusions "on the general population" instead of on "claimant's specific case," *id.* at 16a-17a, and because Tipton had performed the most recent examination. *Id.* at 17a. The Board also rejected petitioner's argument that Tipton's report did not support the ALJ's finding of a totally disabling respiratory condition, and held that the ALJ was entitled to give little weight to the accident records because their purpose was to monitor the claimant's injuries from that incident, not to determine his pulmonary condition. *Ibid.* The Board concluded that "regardless of whether claimant was disabled by the car accident, the pertinent issue [for purposes of] subsection [727.203](b)(3) was whether pneumoconiosis played any role in his disabling impairment." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-11a. The court first emphasized that petitioner did not dispute McAngues's entitlement to invoke the interim presumption of total disability due to mine-related pneumo-

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any temporary respiratory infection at the time he examined McAngues, and McAngues testified that he did not have a cold on that date. *Id.* at 4a. The ALJ credited Kress's test results and opinion as of the date of his examination, *id.* at 22a, but found Kress's speculations about McAngues's condition in 1982 insufficient to overcome Tipton's later examination, test results and medical opinion. *Id.* at 21a.

coniosis under Section 727.203(a), but addressed only the issue of rebuttal. Pet. App. 6a. While noting that it had not previously "directly addressed the issue presented by this case, whether an independent, totally disabling condition that predates the existence of a pulmonary disability establishes rebuttal under section [727.203](b)(3)," *id.* at 6a-7a, the court pointed out that it had held in other rebuttal cases that an employer cannot rebut the presumption under Section 727.203(b)(3) "if pneumoconiosis at least partially contributes to [a claimant's] total disability." Pet. App. 7a (citing *York* v. *Benefits Review Bd.*, 819 F.2d 134, 137 (6th Cir. 1987), and *Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985)).

Applying that principle to this case, the court concluded that "[a]n employer cannot rebut the presumption of total disability by showing a second disability that is entirely independent of a claimant's disabling pneumoconiosis." Pet. App. 9a. The court adopted (*id.* at 8a) the reasoning of the Tenth Circuit, which had concluded in a factually similar case that "the statute is intended to confer special benefits on miners who are disabled due to pneumoconiosis whether or not they are disabled from a different cause." *Twin Pines Coal Co.* v. *United States Dep't of Labor*, 854 F.2d 1212, 1215 (10th Cir. 1988). Thus, the court held that "an employer's demonstration of a separate, non-respiratory disabling condition is irrelevant to a rebuttal of the presumption" under Section 727.203(b)(3). Pet. App. 1a.

The court distinguished (Pet. App. 7a-8a) language from opinions of the Fourth and Seventh Circuits to the effect that "[a] miner is not entitled to benefits if * * * he would have become totally disabled (and no later than he did) even if he had never gone near a coal mine." *Shelton* v. *Director, OWCP*, 899 F.2d 690, 693 (7th Cir. 1990);

see also *Robinson* v. *Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990). The court explained that those decisions involved the evaluation of the relative contributions of mining and smoking to the same disabling pulmonary disease, and therefore involved "the possible synergistic effects of two activities that are harmful to the lungs." Pet. App. 8a. It therefore found them inapposite to this case, "where both parties have arguably demonstrated the existence of two totally disabling, though entirely unrelated, conditions." *Ibid.*

For the foregoing reasons, the court of appeals rejected petitioner's argument that the ALJ had failed to deal adequately with the role of McAngues's car accident in his disability, finding that the ALJ had "firmly conclude[d] that McAngues's pneumoconiosis would have left him totally disabled even in the absence of the * * * accident." Pet. App. 9a.

Finally, the court found it "perfectly apparent" that the ALJ had properly "compared two competing medical opinions and rejected one in favor of the other, and [given] adequate reasons for doing so"; it held that "Dr. Tipton's opinion, supplemented with the objective test results, constitute[d] substantial evidence that more than adequately support[ed] the ALJ's conclusion" that McAngues suffered from a total pulmonary disability. *Id.* at 10a-11a.

ARGUMENT

This case involves a claim brought under the interim regulations, codified at 20 C.F.R Pt. 727, that govern BLBA benefits claims filed after December 31, 1973, but before April 1, 1980. See note 1, *supra*; *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2530 (1991); *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 139 (1987). The permanent regulations applicable to claims

filed on or after April 1, 1980, codified at 20 C.F.R. Pt. 718, generally impose more stringent criteria for establishing the existence of pneumoconiosis. They include a rebuttable presumption that pneumoconiosis arose out of coal mine employment if a claimant suffering from the disease worked for at least ten years in a coal mine. 20 C.F.R. 718.203, 718.302. For claims filed on or after January 1, 1982, however, the permanent regulations do not provide any presumption that a claimant's pneumoconiosis is totally disabling. Thus, the bulk of the claims now pending under the BLBA (as well as all future claims) that raise concurrent disability issues like those involved in this case will arise under regulations different from those applicable to this case. The concurrent disability issue presented here under the interim regulations has not given rise to a conflict among the courts of appeals, and does not warrant review by this Court.

1. The court of appeals correctly held that petitioner had not rebutted the interim presumption of compensable disability raised in the claimant's favor by 20 C.F.R 727.203(a)(1).[3] Section 727.203(b)(3), on which petitioner relies, requires a showing that the claimant's disability "does not arise in whole or in part out of coal mine employment." Under that standard, the courts of appeals have uniformly held that the presumption is not rebutted if the evidence shows that the claimant's disability is due

[3] The cases belie petitioner's claim (Pet. 12, 15) that Section 727.203(a)'s presumptions are in fact "irrebuttable." See, *e.g.*, *Wetherill* v. *Director, OWCP*, 812 F.2d 376 (7th Cir. 1987); *Moseley* v. *Peabody Coal Co.*, 769 F.2d 357 (6th Cir. 1985); *Ramey* v. *Kentland Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985). See also *Mullins*, 484 U.S. at 158-159.

in any part to mine-related pneumoconiosis.[4] As the court of appeals noted (Pet. App. 8a), petitioner does not dispute that "McAngues's lung disability relates solely to coal-mining [*sic*]." Petitioner continues to contest (Pet. 10-11) the evidence of McAngues's illness, and to argue (Pet. 11 n.4, 12) that because McAngues was allowed to establish a presumption of total disability from evidence of only simple pneumoconiosis, the ALJ should not have concluded that he was totally disabled other than from the auto accident. But those arguments represent either an indirect attack on the interim presumption, which this Court upheld in *Mullins Coal*, 484 U.S. at 158-159 (and which petitioner did not challenge below, see Pet. App. 6a), or a request that this Court review the court of appeals' determination that the ALJ's evidentiary findings were supported by substantial evidence.

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[4] See, *e.g.*, Pet. App. 7a; *Amax Coal Co.* v. *Director, OWCP*, 993 F.2d 600, 602 (7th Cir. 1993) (employer must demonstrate that black lung disease was not "a contributing cause of his disability"); *Thomas* v. *United States Steel Corp.*, 868 F.2d 1523, 1525 (11th Cir. 1988) (ALJ must determine "whether occupational exposure contributed in *any* way" to the disability); *Consolidation Coal Co.* v. *Smith*, 837 F.2d 321, 323 (8th Cir. 1988) (employer must disprove "*any causal relationship* between * * * total disability * * * and [the] respiratory ailment arising from coal mining employment"); *Rosebud Coal Sales Co.* v. *Weigand*, 831 F.2d 926, 928 (10th Cir. 1987) (employer must rule out "any relationship between the disability and coal employment"); *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 123 (4th Cir. 1984) ("employer must *rule out* the causal relationship between the miner's total disability and his coal mine employment"); *Carozza* v. *United States Steel Corp.*, 727 F.2d 74, 78 (3d Cir. 1984) (regulation requires award of benefits for "total disability of which pneumoconiosis is a contributing cause"); *Palmer Coking Coal Co.* v. *Director, OWCP*, 720 F.2d 1054, 1058 (9th Cir. 1983) (employer must "rule out any causal link between the disability and the coal mine employment").

See also *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 20 (1976) ("pneumoconiosis, simple or complicated," may be "totally disabl[ing]" within the meaning of the BLBA). In neither case do they merit further review.

2. a. Petitioner argues (see Pet. 7, 12) that proof of a second total disability, unrelated to pulmonary function or to coal mine employment, should rebut the interim presumption of compensable disability based on demonstrated pneumoconiosis and negate a claimant's entitlement to black lung benefits. The court of appeals correctly rejected that contention. Pet. App. 9a. The purpose of the BLBA is to provide benefits to the "significant number of coal miners * * * who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines." 30 U.S.C. 901(a). There is no indication that Congress intended to exclude from this coverage miners who, in addition to being disabled by mine-related pneumoconiosis, also suffer from some unrelated disability. A claimant who can neither breathe well nor walk well is unambiguously worse off than one who can do either without hindrance; there is nothing surprising about the proposition that proof of the latter disability should be irrelevant to eligibility for benefits provided for the former.[5]

The decision in this case, moreover, is consistent with those of other courts of appeals. In *Twin Pines Coal Co.* v. *United States Dep't of Labor*, 854 F.2d 1212, 1213 (10th Cir. 1988), for example, the evidence showed that the claimant was entitled to the interim presumption under Section 727.203(a), but also that he was independently

[5] In this regard, it is noteworthy that BLBA beneficiaries are entitled not only to income-displacement benefits, but also to medical and vocational rehabilitation specifically geared to those with pulmonary disabilities. See 20 C.F.R. 725.701, 725.711.

disabled from an earlier mine accident. The Tenth Circuit reviewed the legislative history of the BLBA and its amendments and reasoned that "[t]he Act has always been understood as providing a separate federal benefit for those who were disabled due to pneumoconiosis," even "in cases where a claimant who was initially disabled by other causes, subsequently develops disabling pneumoconiosis." 854 F.2d at 1215.[6] The court therefore concluded that "the statute is intended to confer special benefits on miners who are disabled due to pneumoconiosis whether or not they are disabled from a different cause." *Ibid.*

Similarly, in *Peabody Coal Co.* v. *Director, OWCP*, 778 F.2d 358 (1985), the Seventh Circuit rejected the claim that a claimant who properly invoked the interim presumption was not entitled to benefits because his vascular problems were independently disabling. The court held that "[t]he concurrence of two sufficient disabling medical causes, one within the ambit of the Act, and the other not, will in no way prevent a miner from claiming benefits under the Act." *Id.* at 363; see also *Amax Coal Co.* v. *Director, OWCP*, 801 F.2d 958, 963 (7th Cir. 1986).[7]

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[6] The Tenth Circuit noted in *Twin Pines Coal Co.* that "Congress has explicitly considered and rejected the idea of offsetting federal black lung benefits against state or federal disability benefits paid for a disability other than pneumoconiosis." 854 F.2d at 1215 & n.2.

[7] In *Lollar* v. *Alabama By-Products Corp.*, 893 F.2d 1258, 1267 n.16 (1990), the Eleventh Circuit considered evidence of pulmonary disability in conjunction with evidence of other disabilities (including arthritis and obesity) under the Secretary's permanent regulations. The court made clear that "unrelated disabilities, no matter how severe, would not constitute 'contrary probative evidence' [under 20 C.F.R. 718.204(c)] tending to negate a

b. Contrary to petitioner's contention (Pet. 8-10), the court of appeals' decision does not conflict with *Shelton* v. *Director, OWCP*, 899 F.2d 690, 693 (7th Cir. 1990), or *Robinson* v. *Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990). First, whereas this case involves interpretation of a rebuttal provision of the interim regulations, 20 C.F.R. 727.203(b), both *Shelton* and *Robinson* dealt with the determination of whether claimants were totally disabled "due to pneumoconiosis" within the meaning of the Secretary's permanent regulations in 20 C.F.R. Pt. 718. While the contexts are not unrelated, they are distinct. See, *e.g.*, *Robinson*, 914 F.2d at 37 n.4 (stating that the Fourth Circuit's own prior decision under Section 727.203(b)(3) "provides little guidance in addressing the issue raised" under Section 718.204).

Second, as the court of appeals explained (Pet. App. 8a), both *Shelton* and *Robinson* "dealt with situations in which a miner had been shown to be totally disabled due to pulmonary disease," but the evidence was unclear as to how much of that pulmonary disability was attributable to pneumoconiosis, as opposed to other causes (such as smoking). See *Shelton*, 899 F.2d at 692-693; *Robinson*, 914 F.2d at 36, 38. The basic holding in both cases is that under the permanent Part 718 regulations, a claimant's total disability is "due to" pneumoconiosis if the disease contributes in part to the disability. See *Shelton*, 899 F.2d at 693 ("mining must be a necessary,

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concurrent finding of total *pulmonary* disability. And once a total pulmonary disability is established, such unrelated disabilities obviously are irrelevant to the *causation* of the pulmonary disability. So long as total pulmonary disability is properly established, a claimant is not disqualified simply because he also suffers from other debilitating or disabling conditions." *Ibid.*; see also *Stomps* v. *Director, OWCP*, 816 F.2d 1533, 1536-1538 (11th Cir. 1987).

but need not be a sufficient, condition of the miner's disability"); *Robinson*, 914 F.2d at 38. That standard is consistent with the disability causation standard applicable in Part 727 interim standards cases like this one. While the opinions include broader dicta,[8] those statements are limited by their context, and do not address the very different considerations presented in a case like this one "where both parties have arguably demonstrated the existence of two totally disabling, though entirely unrelated, conditions."[9] Pet. App. 8a. See *Hawkins* v. *Director, OWCP*, 907 F.2d 697, 704 n.11 (7th Cir. 1990) (characterizing "dual-cause" language in *Shelton* as dictum that did not overrule the same court's concurrent unrelated disabilities holdings in *Amax Coal* and *Peabody Coal*, *supra*).

3. Finally, petitioner challenges Section 727.203(b)(3) itself, contending that it is inconsistent with the BLBA because it allows for the payment of benefits to claimants who are only partially disabled by mine-related pneumo-

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[8] See 899 F.2d at 693 ("A miner is not entitled to benefits if by reason of his heavy smoking or some other activity or condition of his that is not itself mining, he would have become totally disabled * * * even if he had never gone near a coal mine."); 914 F.2d at 38.

[9] Compare *Lollar*, 893 F.2d at 1267 n.16 ("unrelated disabilities obviously are irrelevant to the *causation* of the pulmonary disability"). It might make sense to characterize the payment of benefits for a pulmonary disability that would have existed regardless of coal mine employment as a "windfall." See *Shelton*, 899 F.2d at 693. As suggested above, however, that term cannot properly be applied to a claimant who has concurrent unrelated disabilities (such as the pulmonary and neurological disabilities in this case), each of which makes the claimant worse off in distinct and very tangible ways.

coniosis. Pet. 12-13 & n.6.[10] That issue is not presented by this case. The ALJ found that McAngues had established his entitlement to the interim presumption of compensable total disability under Section 727.203(a) of the regulations through medical testimony and tests related to his pulmonary impairments, without reference to the injuries sustained in his automobile accident.[11] Pet. App. 20a-21a, 46a-47a. At that point, the burden shifted to petitioner to to prove either that McAngues did not have pneumoconiosis (20 C.F.R 727.203(b)(4)) or that the identified pulmonary disability "did not arise in whole or in part out of coal mine employment." 20 C.F.R. 727.203(b)(3).[12] Petitioner failed to make either showing.

[10] Petitioner's alternative suggestion (Pet. 8 n.3) that the court should have used a "primary cause" standard, derived from regulations at 20 C.F.R. 410.426, in determining whether the claimant's disability was due to pneumoconiosis is without merit. Section 410.426 is one of the permanent regulations originally promulgated by HEW. HEW later issued more permissive interim regulations, codified at 20 C.F.R. 410.490, and in 1977 Congress explicitly directed that when the Secretary of Labor promulgated the interim regulations applicable to this case they should "not be more restrictive" than the HEW interim regulations. See 30 U.S.C. 902(f); note 1, *supra*; *Pauley*, 111 S. Ct. at 2527-2530. The more stringent standards of HEW's permanent regulations thus have no bearing on this case.

[11] As noted above (see page 9, *supra*), to the extent that petitioner calls into question the presumption of disability itself, it is attempting to raise an argument not preserved below (see Pet. App. 6a), and in any event largely foreclosed by this Court's decision in *Mullins Coal*, 484 U.S. at 158-159.

[12] Contrary to the Benefits Review Board's holding in *Jones* v. *New River Co.*, 3 Black Lung Rep. (MB) 1-199 (June 10, 1981), cited by petitioner (Pet. 13), the "in part" language of Section 727.203(b)(3) refers to causation, rather than to the degree of disability: it permits rebuttal only where the evidence shows that the claimant's demonstrated disability is not due, at least in part, to

The provision of benefits to a claimant with a total pulmonary disability caused at least in part by his coal mine employment is not inconsistent with the BLBA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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coal mine employment. See, *e.g.*, *Roberts* v. *Benefits Review Bd.*, 822 F.2d 636, 639 (6th Cir. 1987) (rejecting *Jones*); *Alabama By-Products Corp.* v. *Killingsworth*, 733 F.2d 1511, 1516 n.10 (11th Cir. 1984) (same); *Gibas*, 748 F.2d at 1120; *Carozza*, 727 F.2d at 78 (same).